No. 13685

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

H. F. SCHAUB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA FIRST DIVISION

HONORABLE GEORGE W. FOLTA, *Judge*

REPLY BRIEF

DONALD MCL. DAVIDSON
1012 Northern Life Tower
Seattle 1, Washington

WILFRED C. STUMP
Ketchikan, Alaska
Attorneys for Appellant.

FRAYN PRINTING COMPANY

No. 13685

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

H. F. SCHAUB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA FIRST DIVISION

HONORABLE GEORGE W. FOLTA, *Judge*

APPELLANT'S REPLY BRIEF

DONALD MCL. DAVIDSON
1012 Northern Life Tower
Seattle 1, Washington

WILFRED C. STUMP
Ketchikan, Alaska

Attorneys for Appellant.

INDEX

TABLE OF CASES

CITATIONS OF STATUTES

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

H. F. SCHAUB,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 13685

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA FIRST DIVISION

HONORABLE GEORGE W. FOLTA, *Judge*

APPELLANT'S REPLY BRIEF

Appellee's statement of the facts is incorrect in a number of particulars. Appellee assumes that the gravel was discovered and developed by the Government and that plaintiff seeks to take the benefits of this development.

It has been shown that the road and log-loading range were constructed by private contractors at their own expense and for their own purposes (App. B. 13-14, 41). There was not an iota of evidence that the actual area of use along the stream constituted

development of the property. It appears that no two contractors worked in the same area, probably because after gravel was taken out there were "roots showing" (Tr. 175) and "some debris" (Tr. 204) comes down the stream with every freshet, thereby fouling the area. It appears that the contract let after appellant filed his mining location contemplates opening up a new area of 8 or 9 acres (Tr. 255). It is nowhere explained how past work in the area is a valuable development by the government of which appellant seeks to take advantage while at the same time the government is abandoning the so-called developed area.

Again, appellee seeks to show that the Whipple Creek area was the only source of gravel for the roadway. As normal procedure a rock crusher may be used and will produce a superior surfacing material (Tr. 315). Indeed, appellant prior to the time the contract was awarded, had been advised by one of the bidders that it would use a rock crusher (Tr. 311-313, record incorrectly uses the word "pressure" for "crusher").

In appellant's sand and gravel business it is necessary to have up to 40% of sand or fine aggregates for production of concrete products (Tr. 315), but these fine materials are not necessary for road surfacing and cannot be produced with a rock crusher (Tr. 314). Appellee confuses the need of "sand and

gravel aggregates for Ketchikan" (App. B. p. 11) with the single requirement of coarse gravel or crushed rock for road surfacing. The former is what gives the deposit value as a mine. Gravel useful only for road surfacing in the Ketchikan area probably would not sustain a mineral location since it could not be extracted and marketed at a profit in competition with the more economical method of producing a superior product through use of a rock crusher.

APPELLEE'S ARGUMENT

I.

Public Land Order 734 Did Not "Relate Back"

Nowhere does appellee cite a single case, rule or regulation justifying the lower court's ruling that Public Land Order 734 "related back" to invalidate appellant's earlier location. Appellee has not even offered a countering argument to that set out at pages 16-25 of appellant's brief. It must be assumed that appellee concedes the lower court erred upon this issue, and that there is no authority contrary to that cited by appellant.

II.

Correction Memorandum No. 11 Was Not a Special Use Permit Under 48 U.S.C. § 341.

While the lower court refers to the correction

memorandum as a special use permit throughout its opinion, no one else ever referred to it as such before or at the trial. While appellant believes that it has shown the memorandum could not have been such a permit the fact is that no one urged it to be such at the trial because the government disclaimed its intention to rely upon that statute (App. B. pp. 35-37). Indeed, when questions were asked concerning other correction memoranda the government objected (Tr. 208). Thus, appellant was deprived of his opportunity to prove:

1. That Correction memoranda one through ten were not and could not have been issued under 48 U.S.C. § 341;

2. That there are special regulations governing issuance of permits under that statute, and Correction Memorandum No. 11 does not meet those requirements;

3. That regulations require publication of such a permit and/or recording in the local land office and/or posting upon the ground; and

4. That correction memoranda are prescribed for internal office procedure as a preliminary to issuance of a special use permit, or for the purpose of correcting maps or applying for land order withdrawals.

Because evidence is lacking, appellee theorizes as

to the facts. Thus, it asserts that withdrawal by Public Land Order was necessary to make the withdrawal perpetual and not limited to thirty years. First, a withdrawal by public land order is not perpetual and may be revoked at any time, 38 Stat. 113, 43 U.S.C. §§ 151, 152. Second, there was not the slightest evidence that the government would require use of the land for more than thirty years or that if it did another permit could not then be issued. Third, there is no evidence whatsoever that indicates anyone had such purpose in mind.

Certainly, no "sound business practice" required withdrawal by the Secretary of the Interior. Congress provided for a complete and unequivocal withdrawal by issuance of a special use permit. The statutes authorizing a public land order withdrawal, 36 Stat. 847, 37 Stat. 497, 43 U.S.C. §§ 141, 142, provide that even after such a withdrawal the lands "shall at all times be open to exploration, occupation and purchase under the mining laws of the United States so far as the same apply to metaliferous minerals." Thus, litigation, whatever its result might be, could arise out of a withdrawal by public land order where none could arise out of a special use permit under 48 U.S.C. § 341.

Again, appellee argues that there is no inconsistency between a permit and a public land order with regard to application of the mineral leasing laws

and appears to take the position that the land is subject to such laws. If the land may be leased then there could be no special use permit. The statute provides that lands covered by such a permit after its issuance *"shall not be subject * * * to disposition under the mineral leasing laws."* (48 U.S.C. § 341). The Secretary of Agriculture has no discretion to issue a permit and subject the lands to the mineral leasing laws. If land is valuable for its minerals it should be developed under the mining or mineral leasing laws. If, on the other hand, the Secretary of Agriculture determines that the land should be developed for some other purpose, then it should be developed for that purpose free from any possibility of interference by virtue of the mining and mineral leasing laws.

Appellee is in error in asserting that no lease of the mineral deposits could be made by the Secretary of Agriculture. 30 U.S.C. §§ 274 and 284 both provide for leasing of "coal and other minerals."

Appellee has likewise made no showing that there was any publicity at all in connection with issuance of Correction Memorandum No. 11.

Wolsey v. Chapman, 101 U.S. 755, involved a presidential proclamation and directions from the Secretary of the Interior to local land officers, *United States v. Midwest Oil Co.,* 236 U.S. 459, dealt with a presidential proclamation, and *United States v.*

Payne, 8 Fed. 833, determined that lands had been reserved by treaty because a treaty was equivalent to an act of Congress. None of appellee's cases concerned a purported withdrawal by a regional forester. Forest Service regulations require that withdrawals by public land order be published in the Federal Register (Tr. 92) and that recreation areas

> "* * * be posted at frequent intervals along the boundary of the area and at prominent places within the area, such as along routes of travel." (Tr. 91).

If actual posting on the ground is required for classification of a recreation area—which does not withdraw the land from mineral entry—how can it be conceived that a permit withdrawing land need not be either published or posted. In this case, no prospector could determine that the area had been withdrawn either by examining the ground or the land records of the local recording precinct.

Finally, appellee cites no authority whatsoever that a special permit may be issued *by* the government *to* the government. If the effect of Correction Memorandum No. 11 was merely to "take the property out of the control of one and lodge it in the control of another set of government officials, while the title remained in the same status as it had been before," as appellee asserts, then it would not be authorized under 48 U.S.C. § 341. Withdrawal by public land order was a well established procedure for

accomplishing that purpose. Congress could not have intended merely to provide an alternative method of withdrawal where the first was adequate for such purpose. The purpose of the statute was to allow for the development of Alaska "commercially and industrially" not to extend the carefully restricted executive power of withdrawal. It was intended to "broaden and make more practicable" existing authority of the Secretary of Agriculture, not to extend to him the hitherto unavailable power of withdrawal (Sen. Rep. 899, 80th Cong. 1st Sess).

III.

There Was No Actual Use or Possession Constituting an Authorized Withdrawal of Any Area.

Appellee devotes the major portion of his brief to the withdrawal of the three-acre tract. While this area is of little practical importance to either appellant or appellee, the argument is erroneous. It assumes that the use of the land prior to the time of appellant's location was possession of a character to withdraw the land. *Scott v. Carew,* 196 U.S. 100, cited by appellee, quoted and approved the rules of *U.S. v. Fitzgerald,* 15 Pet. 407, that authorized withdrawals do not "relate back" and that actual occupation of lands by direction of subordinate officers of the government does not withdraw land. *Scott v. Carew* also approved *U.S. v. Tichenor,* 12 Fed. 415,

but held that there was a withdrawal in the case under consideration because it had been proved that the occupation of particular lands was at the direction of the head of an executive department and was to be permanent. The court quoted war department orders to the officer in charge, directing him to "establish a military post."

In this case all of the evidence shows that each use of the tract was temporary and intended to be such. It does not appear that any government officer, even as high as the regional forester, ever directed that there be any use or occupation of the area—and certainly not permanent occupation.

Some gravel was removed in 1934 (Tr. 124). In 1942 the Forest Service consented to the removal of three or four hundred yards of gravel by the Coast Guard (Tr. 129). During 1948 a contractor removed 15,269 yards (Tr. 131). Other contractors removed 6,654 yards in 1949 and 8,215 yards in 1950 (Tr. 135). During 1949 a contractor removed about 1,000 yards of material for driveways under verbal permission to make free use of it (Tr. 162). These uses were clearly permissive and were use and occupation by independent contractors, not by servants or agents of the government. Indeed, the removal of material by contractors appears to have been in violation of Regulation U-11 (J) (Tr. 165, Pl. Ex. 2, Tr. 109, 118). That regulation prohibits a free use

permit to contractors where the contractor is required to furnish all materials as was the case with the contracts here (Tr. 166). This breach of regulations clearly shows that the use could not have been authorized by the Secretary of Agriculture and was not pursuant to his directions to use the area permanently. The Forest Service iteslf has never removed any gravel from defendant's claim with its own equipment and its own employees (Tr. 130).

If appellee had intended its use to be a withdrawal it had seventeen years from the first such use in 1934 to perfect it; yet it failed to do so. Actually the request for withdrawal ultimately acted upon was made by letter of the Bureau of Public Roads about January 31, 1951 (Tr. 137-138), and this was at a time after the last use of the premises in December of 1950 (Tr. 135). There never was any use contemporaneous with an intention to withdraw the lands.

The issue is not, as appellee assumes, whether or not the government abandoned possession, but whether it ever had the concurrence of possession and a direction to occupy by an executive officer of the government sufficient to withdraw the land from entry. Thus, assuming there was an actual withdrawal by possession, appellee argues there was no abandonment, citing cases far removed from the present case. *United States v. Fullard Leo,* 331 U.S.

256, held that the plaintiff should prevail on his claim to Palmyra Island on the theory of a lost grant from the Kingdom of Hawaii; *Equitable Life A.S. v. Mercantile-Commerce B & T Co.,* 155 F.(2d) 776, concerned a defense by an insurance company that the insured "had abandoned and relinquished his rights to benefits"; *Helvering v. Jones,* 120 F.(2d) 828, held that a taxpayer had failed to show an "abandonment loss" under the internal revenue code; and *In re Stillwell,* 120 F.(2d) 194, held that the evidence did not justify dismissal of the bankruptcy debtor's petition for discharge on the ground of "abandonment."

Finally, appellee mistakenly asserts that had the government been a private locator, appellant's entry would be invalid. No cases are cited and indeed could not be because the authority is to the contrary:

> "* * * the mere occupany of unpatented mining ground and even work being done thereon by the one in possession in the absence of a previous location of the ground, is not sufficient to prevent its relocation by a qualified locator provided that the location is made peaceably and without force." *Oliver v. Burg,* 58 P.(2d) 245 (Ore. 1936).

Kramer v. Gladding McBean & Co., 85 P.(2d) 552 (Cal.), held and *Oregon King Min. Co. v. Brown,* 119 Fed. 48 (CCA 9th), assumed that a relocator may adopt an earlier location "particularly if the evi-

dence of such discovery is apparent to the sight of the relocator."

The lower court specifically found that appellant located his claim "openly and peaceably" (Finding IV, Tr. 59).

Actually no act of the government can be equated to those required of a mineral locator—there was no posting of either discovery, corner or boundary notices on the ground, no clearing of boundary lines, and no actual possession at all at the time appellant made his location, and no one had been in actual possession for six months prior to the location. Alaska Compiled Laws 47-3-33 provides that a claim is open to relocation ninety days after discovery, unless there is compliance with the recording requirements.

CONCLUSION

Appellant respectfully submits that appellee has shown no basis whatsoever for sustaining the lower court's decision that (1) Public Land Order 734 "related back," and (2) that Correction Memorandum No. 11 was a special use permit when that issue was not litigated and the evidence clearly shows it was not intended as and could not legally be such a permit.

Respectfully submitted,

DONALD MCL. DAVIDSON
1012 Northern Life Tower
Seattle 1, Washington

WILFRED C. STUMP
Ketchikan, Alaska

Attorneys for Appellant